Supreme Court U.S.
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No. 02-683

IN THE

Supreme Court of the United States

WORLD WIDE MINERALS LTD., WORLD WIDE RESOURCE FINANCE INC., KAZURAN CORPORATION, and NUCLEAR FUEL RESOURCES CORPORATION,

Petitioners,

v.

THE REPUBLIC OF KAZAKHSTAN, THE STATE COMMITTEE OF THE REPUBLIC OF KAZAKHSTAN ON THE MANAGEMENT OF STATE PROPERTY, and THE NATIONAL ATOMIC COMPANY KAZATOMPROM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE REPUBLIC OF KAZAKHSTAN AND THE STATE COMMITTEE OF THE REPUBLIC OF KAZAKHSTAN ON THE MANAGEMENT OF STATE PROPERTY

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QUESTIONS PRESENTED

The court of appeals concluded that Petitioners' claims against the Republic of Kazakhstan, the State Committee of the Republic of Kazakhstan on the Management of State Property and the National Atomic Company Kazatomprom (collectively "Kazakhstan") had been properly dismissed by the district court because Kazakhstan has sovereign immunity and additional protection against these claims under the act of state doctrine.

The questions presented are:

(1) Whether Kazakhstan expressly waived its sovereign immunity in the Loan and Strategic Alliance Agreements?

(2) Whether denial of an export license and expropriation of property are classic acts of state?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioners are World Wide Minerals Ltd., World Wide Resource Finance Inc., KazUran Corporation, and Nuclear Fuel Resources Corporation. The Petitioners will be collectively referred to as "World Wide" or "Petitioners."

Respondents are the Republic of Kazakhstan, the State Committee of the Republic of Kazakhstan on the Management of State Property (the "State Committee") and the National Atomic Company Kazatomprom ("Kazatomprom").

The Republic of Kazakhstan is a sovereign nation located in Central Asia and is a foreign state as defined in 28 U.S.C. § 1603(a). The State Committee was established by resolution of the Cabinet of the Republic of Kazakhstan on May 29, 1995 and is an agency or instrumentality of a foreign state within the meaning of 28 U.S.C. § 1603(b). Kazatomprom is a corporation organized under the laws of the Republic of Kazakhstan and is wholly owned by the Republic of Kazakhstan. As a result, Kazatomprom is a foreign state pursuant to 28 U.S.C. § 1603(b). The Republic of Kazakhstan, the State Committee, and Kazatomprom will collectively be referred to as "Kazakhstan."

Nukem, Inc. ("Nukem"), a corporation organized under the laws of the state of New York, was a party in the proceedings below. The claims against Nukem were originally dismissed by the district court. The court of appeals reversed the dismissal of Nukem and remanded for further proceedings.

Because the Republic of Kazakhstan is a foreign state, there is no corporate disclosure requirement applicable under Rule 29.6. Similarly, the State Committee is a governmental agency and/or instrumentality of the Republic of Kazakhstan and is likewise not required to file a corporate disclosure statement.

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STATEMENT OF THE CASE

In 1995, the Republic of Kazakhstan issued a decree announcing the privatization of the country's uranium industry and its intention to contract with foreign investors for the management of what had been state-run facilities. (3a).[1] Shortly thereafter, World Wide submitted a proposal to take over the management of Tselinny Gorno-Khimicheskii Kombinat ("TGK"), a state holding company that operated a uranium complex located near Kazakhstan's Northern Mines. (3a).

As a result of World Wide's proposal, during 1996 and 1997 various combinations of Petitioners and Kazakhstan and their related entities entered into four separate and distinct agreements relating to the mining of uranium in the Republic of Kazakhstan. These agreements are: the Management Agreement, the Pledge Agreement, the Loan Agreement and the Strategic Alliance Agreement. (4a-5a). Kazakhstan waived sovereign immunity in the Management and Pledge Agreements, but did not do so in the Loan and Strategic Alliance Agreements.

Pursuant to these agreements, World Wide took over the management of one of Kazakhstan's major uranium complexes and loaned Kazakhstan money to fund the restoration of the facility. (1a). In return, World Wide contends that Kazakhstan agreed to permit it to export Kazakhstan uranium. The gravamen of Petitioners' complaint is that Kazakhstan breached these four agreements by (1) failing to issue a uranium export license to World Wide;

1. All references in parenthesis refer to pages in World Wide's Petition for a Writ of Certiorari and the accompanying appendices.

and, (2) expropriating and nationalizing World Wide's assets in Kazakhstan. (1a-2a). World Wide asserts multiple contract and tort claims against Kazakhstan, all arising from these two undisputed acts of state. (2a).

Petitioners seek improperly to divorce themselves from their earlier pleadings in the district court. While they now call the denial of an export license an "auxiliary, administrative task" (*i*), Petitioners' Amended Complaint actually describes the failure to issue the export license as "the very heart of this matter." (20a). In Count I, World Wide claims that Kazakhstan breached the Management Agreement by "failing to issue an export license." (20a). In Count XI, World Wide sought a declaratory judgment based upon the "denial of Plaintiff[s'] export license." (20a). In Count III, World Wide alleged that Kazakhstan breached the Pledge Agreement "by converting all pledged property, assets, and interests for [its] own use." (22a). Moreover, World Wide admits that the alleged conversion was accomplished pursuant to an official decree of the Republic of Kazakhstan. (22a). These allegations, which are repeated throughout the Amended Complaint, make clear that nearly all of World Wide's claims arise from either the denial of an export license or the expropriation of property – acts admitted by Petitioners in oral argument as uniquely sovereign under the act of state doctrine. (23a).

REASONS FOR DENYING THE PETITION

I.

THE ISSUES INVOLVED DO NOT SATISFY THE CRITERIA FOR GRANTING A PETITION FOR WRIT OF CERTIORARI

A petition for a writ of certiorari will be granted only for compelling reasons. U.S. Sup. Ct. R. 10. Certiorari may be granted where a United States court of appeals: (1) has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; (2) has decided an important federal question in a way that conflicts with a decision by a state court of last resort; (3) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power; or (4) has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. *Id.*

World Wide's petition for a writ of certiorari implicates none of these factors. Indeed, the crux of World Wide's petition is that the court of appeals improperly applied the act of state doctrine and the Foreign Sovereign Immunities Act ("FSIA") to bar their claims. (5). However, as noted in U.S. Sup. Ct. R. 10, the misapplication of a properly stated rule of law is rarely grounds for granting certiorari.

Petitioners also claim that the court of appeals' decision is inconsistent with those of other circuits. (15-16). However, the conduct complained of in this case, the denial of an export

license and the nationalization of property, has consistently and uniformly been considered by all circuits as sovereign in nature. World Wide cites no authority to the contrary, and conceded this point during oral argument before the court of appeals (23a). As a result, certiorari is unwarranted.

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT KAZAKHSTAN DID NOT WAIVE SOVEREIGN IMMUNITY AS TO ALL OF PETITIONERS' CLAIMS

Petitioners argue that the court of appeals improperly applied the FSIA. (5-6). As noted above, the application of existing law to the facts of a case is not ordinarily a sufficient basis to grant certiorari. *See* U.S. Sup. Ct. R. 10. Even on the merits, the court of appeals' decision is correct – Kazakhstan did not waive sovereign immunity as to all of Petitioners' claims. Only two of the four separate contracts at issue, the Management Agreement and the Pledge Agreement, contain an express waivers of sovereign immunity. (15a). Kazakhstan did not waive sovereign immunity with regard to the Loan or Strategic Alliance Agreements. (16a-17a). Petitioners did not argue in its brief on appeal that the commercial activities exception to the FSIA was applicable, instead relying solely on the waiver exception under 28 U.S.C. § 1605(a)(1). (12a-13a). As a result, World Wide is precluded from raising that argument now. (13a).

Petitioners' claim that the court of appeals' decision "was, at best, disingenuous." (6). That unbecoming assertion is without merit, and Petitioners fail to cite any cases or any

portion of the record that contradicts the court of appeals' decision. Instead, Petitioners argue in conclusory fashion that no cases have been found supporting the court of appeals' narrow interpretation of what constitutes a waiver of sovereign immunity under the FSIA. (6). Petitioners ignore the several decisions cited in the court of appeals' opinion, (14a-15a), which make clear that waivers of sovereign immunity are narrowly construed and are not enlarged "beyond what the language requires." *Library of Congress v. Shaw*, 478 U.S. 310 (1986). As a result, the court of appeals was correct in concluding that Kazakhstan did not waive sovereign immunity as to the Loan and Strategic Alliance Agreements, neither of which contain waivers of Kazakhstan's sovereign immunity. (16a). Since World Wide failed to preserve its argument on 28 U.S.C. § 1605(a)(2), the commercial activity exception to the FSIA, the inquiry is ended.

III.

THE ACT OF STATE DOCTRINE BARS THE BALANCE OF PETITIONERS' CLAIMS

A. The Act of State Doctrine

The act of state doctrine provides that a United States court may not adjudicate a dispute that requires it to sit in judgment on the legality of a foreign sovereign's act committed within its own territory. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). All of World Wide's claims and alleged damages arise from Kazakhstan's failure to grant Petitioners an export license and the subsequent nationalization of their property, conduct that has uniformly been held by United States courts to be sovereign. *See Ricaud*

v. American Metal Co., 246 U.S. 304 (1918) (nationalizing property an act of state); *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203 (D.C. 1987) (nationalizing property an act of state); *MOL, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79, 85-86 (D. Or. 1983), *aff'd on other grounds*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (denial of export license an act of state); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 332-34 (E.D.N.Y. 1977) (decisions regarding export licenses are acts of state).

In *Ricaud*, this Court ruled that United States courts did not have jurisdiction to determine ownership of property confiscated and sold by the government of Mexico because such confiscation was an act of state. *Ricaud*, 246 U.S. at 310.

In *Dayton*, the plaintiff sued the Czechoslovak Socialist Republic for allegedly nationalizing plaintiff's textile plant located in the Czechoslovak Socialist Republic. The court of appeals held that the act of state doctrine precluded plaintiff from proceeding. *Dayton*, 834 F.2d at 206-207.

The law is equally clear with regard to denials of export licenses. In *MOL*, Bangladesh granted plaintiff a ten-year license to capture and export monkeys from Bangladesh. After Bangladesh terminated the agreement, plaintiff sued Bangladesh in the United States for breach of the agreement. The court held that the act of state doctrine precluded the court from ruling on the claim. *MOL*, 572 F. Supp. at 86.

Similarly, in *Grumman* plaintiffs sued defendants for interference with, and conspiring against their application for an export license from Brazil. Although plaintiffs did not

sue Brazil or any of its agencies directly, the Court dismissed plaintiffs' claims pursuant to the act of state doctrine. *Grumman*, 432 F. Supp. 329, 332-34.

The reasoning of *Ricaud*, *Dayton*, *MOL*, and *Grumman* apply with equal force to the facts in this case. World Wide alleges that Kazakhstan breached the agreements by wrongfully denying World Wide an export license, and that Kazakhstan nationalized World Wide's property. The act of state doctrine precludes inquiry into these issues by a United States court.

B. The Commercial Activities Exception Does Not Apply

World Wide argues that the court of appeals ignored the "commercial activities exception" to the act of state doctrine (14-16). This is not accurate. The court of appeals held that, in light of World Wide's claims, it did not need to address the issue. (23a). The court of appeals' decision was properly based upon the fact that Kazakhstan's alleged "purely commercial conduct," the failure to repay loans, refusal to enter into a joint venture, and failure to pay management fees, were not the claims dismissed pursuant to the act of state doctrine. (23a). On the contrary, the alleged failure to repay loans was raised only by World Wide in Count I, a claim dismissed on sovereign immunity grounds. (23a). The alleged refusal of Kazakhstan to enter into a joint venture was raised only in Count IV, a claim that does even not name Kazakhstan as a defendant. (23a-24a). Finally, the last allegation of "purely commercial conduct" by Kazakhstan, the alleged failure to pay management fees, was not alleged in the Amended Complaint. (24a). Because World Wide did not properly raise the issue, the court of appeals was correct in declining to address World Wide's arguments concerning any commercial activity as a possible exception to the act of state doctrine.

CONCLUSION

The court of appeals held correctly that because neither the Loan nor Strategic Alliance Agreements contain waivers of sovereign immunity, consideration of any of Petitioners' claims arising from these agreements is barred by the FSIA. The court of appeals was also correct in concluding that the act of state doctrine bars consideration of Petitioners' remaining claims – all of which complain of two indisputably sovereign acts. Finally, Petitioners have failed to identify any particular public interest, split in authority, or other basis that would warrant the grant of certiorari in this case. On the contrary, the principles implicated by this action are fairly well settled. For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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